STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of QUENTIN BOTWRIGHT and AMYA BOTWRIGHT, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DENAE MARTIN,

Respondent-Appellant.

UNPUBLISHED
November 4, 2008

No. 285429
Marquette Circuit Court
Family Division
LC No. 06-008544-NA

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Respondent's sole claim on appeal is that she was denied the effective assistance of counsel at the termination hearing. A respondent has a right to the effective assistance of counsel in a child protective proceeding. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353 n 10; 612 NW2d 407 (2000). Because respondent did not raise this claim below, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim of ineffective assistance of counsel, respondent "must first show that (1) h[er] trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and [respondent] must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

Respondent contends that counsel was ineffective because he failed to present an opening statement and a closing argument, failed to call her and other witnesses to testify, and failed to present documentary evidence.

The purpose of an opening statement is to "state the facts to be proven at trial." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). The decision whether to make an opening statement is a matter of trial strategy. *People v Hempton*, 43 Mich App 618, 624; 204 NW2d 684 (1972). The waiver of opening statement is a "subjective judgment[] on the part of trial counsel which can rarely, if ever, be the basis of a successful claim of ineffective assistance of counsel." *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Likewise, the decision whether to give a closing argument is a matter of trial strategy, *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999), and "[i]t is not error for defense counsel to waive his final argument." *People v Burns*, 118 Mich App 242, 247; 324 NW2d 589 (1982).

The record shows that the trial court did not request, and counsel did not ask to present, an opening statement. The record also shows that the parties waived closing arguments. Because this was a nonjury hearing, the essential facts were not in dispute, the court was well aware of the issues to be determined, and counsel's arguments are not evidence, respondent has not shown that counsel's decision to waive his opening statement and closing argument constituted error, or that had counsel presented an opening statement and closing argument, the outcome of the proceeding likely would have been different.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). "Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Bass* (*On Rehearing*), 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record shows that respondent attended the hearing and that counsel rested without calling respondent or any other witnesses to testify. The record does not indicate that there were other witnesses who could have offered testimony relevant to the issues before the court or what testimony they or respondent might have offered if called. Thus, respondent has failed to establish an error that was likely to have affected the outcome of the hearing. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

The record further shows that counsel stipulated to the admission of various exhibits, including one favorable to respondent indicating that she had recently completed the anger management group. The record implies the existence of other documents favorable to respondent, such as her GED certificate and the lease to her apartment, but those would have been cumulative to the testimony offered at the hearing. The failure to present cumulative evidence generally does not constitute ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 603-604; 623 NW2d 884 (2001); *People v Bedford*, 78 Mich App 696, 702-703; 260

NW2d 864 (1977). The record does not show that there was any other documentary evidence beneficial to the defense that could have been presented. Therefore, respondent has failed to establish a right to relief.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis